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## State Constitutions for the 20th Century

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# STATE CONSTITUTIONS FOR THE 20th CENTURY\*

*William F. Swindler+*

## FEDERAL AND STATE CONSTITUTIONAL CHANGES 1890-1970

The second Constitution of the United States, succeeding the old Articles of Confederation in 1789, is now more than 180 years old. The making of constitutions for the individual states, dating from 1776, will soon be completing its second century with nearly 135 different state constitutions to trace its course of development over that period. The number of new fundamental charters adopted by the various states, with an uncounted total of many dozens of amendments, and the accelerating process of amending the Federal Constitution, with eleven of the twenty-six amendments being adopted in this century, all is taken as evidence of the adaptation of organic law to the changing requirements of a changing society. This paper suggests that the evidence may not be all that persuasive.

Much has been made of the fact that there has been, in the past five years, a nationwide quickening of pace in the drafting of new state constitutions, or comprehensively revising them after exhaustive scrutiny by select bodies of scholars in law and political science, or particularly experienced legislators and jurists, or combinations of the same. Much time and money has been invested in these projects in more than two-thirds of the states of the Union during this period, and to the extent that these efforts may bring about more efficient and economical functions of state and local government, they are not to be denigrated. But this does not necessarily mean that, after all is said and done—the drafting completed, the voting conducted and perhaps the proposed modernization adopted—these states will be in optimum position to deal with the proliferating social and economic challenges of the seventies, the eighties or the nineties.

One critic of current state constitution-making has written:

Changes in state constitutions still are largely directed toward the goals of the Efficiency and Economy movement of two generations

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\* An address delivered at the College of Law, University of Nebraska, November 11, 1970.

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ago, concentrating upon professionalization of all branches of government rather than upon improving the responsiveness of state government to widespread popular demands and the major contemporary issues in society.<sup>1</sup>

While one may meet this criticism with the suggestion that such demands and crises will probably continue to be dealt with at the national level of government as they have been, for the most part, for the past thirty-five years, the fact remains that very few, indeed, of the revisions in state constitutions recently or in the past quarter of a century have featured any significantly new propositions of government or constitutional duties.<sup>2</sup>

There are numerous reasons for this. Constitution-making is, essentially, a political process, and as in other areas of political life it is the practice of the art of the possible. Where proposed changes are too strange or daring, the electorate will almost certainly reject them. This tends to encourage the continuation in new constitutions of many presumably fundamental provisions in the old, which means, in many instances, the continuation of the generally narrow constructions of those provisions handed down by the state courts over the decades. What is worse, the elaborately detailed restrictions upon state action and the often involved procedures for taking certain action, even if streamlined in a new draft, will remain as precedents for continued self-limitation. Thus so-called modernization of the existing constitution may all too often frustrate what have been described as the elemental needs of the present: "to facilitate active and dynamic state and local government," and to overcome the temptation "to predetermine decisions with respect of policies and services . . . by writing specific prohibitions, mandates or prescriptions into the state constitutions."<sup>3</sup>

As a result, new constitutions are seldom really new. They preserve so much of the language of antecedent constitutions that the likelihood of legislative, executive or administrative bodies being motivated to develop new concepts of government service is minimal. Too many state constitutions continue to be filled with non-constitutional matter: legislative and administrative detail frozen

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<sup>1</sup> Adrian, *Trends in State Constitutions*, 5 HARV. J. LEGIS. 311, 341 (1968).

<sup>2</sup> See STURM, *THIRTY YEARS OF STATE CONSTITUTION-MAKING, 1938-1968 passim* (1970); Sturm, *State Constitutions and Constitutional Revision, 1967-1969*, in *THE BOOK OF THE STATES, 1970-1971* 3-28 (1970); Graves, *State Constitutional Law: A Twenty-five Year Survey*, 8 WM. & MARY L. REV. 1, 13 (1966).

<sup>3</sup> Bebout, *The Salient Issue: Constitutional Revision—What For?*, in *SALIENT ISSUES OF CONSTITUTIONAL REVISION* 166 (Wheeler ed. 1961).

into the fundamental law to prevent current officeholders from readily revising them. In addition, as the record of twentieth century history suggests, the long period of excessively narrow construction in national constitutional law tended to vitiate the efforts of state governments to deal with changing social and economic issues, and by the time a "new legality" had developed in national constitutional law, circumstances had established an apparently permanent state of inhibition upon government action in state constitutional law.

This paper will seek, first, to demonstrate from the history of both federal and state constitutional developments in the twentieth century how state constitutional law has reached its present condition, and second, to suggest what might be goals for a truly new state constitutionalism for the remaining decades of the century.

As the nineteenth century entered its final decade, the frontier had all but disappeared. For the American farmer, this was already having a fundamental effect upon his independence—he could no longer move west as his land was worked out; he found his markets circumscribed by organized railroad networks which were one of several fundamental factors controlling the prices for his produce; and finance capital for his yearly operations was ultimately controlled by remote and massive banking houses. For the city dweller, it was the age of the industrial trust, unregulated urban growth, adulterated foods and drugs, and rapid advances in technological services which were all too often exploited by corrupt and corrupting utility combines.

The struggle of state legislatures and later of Congress to cope with these challenges, the general negating of these efforts upon review of the legislation in the courts, and the resultant movement to amend state and national constitutions are the chapters in American political history from the Populist uprising through the Progressive movement to the "New Freedom" of the first Wilson administration.<sup>4</sup> The temporary triumph of laissez-faire economics in the twenties was only to prove a final bankruptcy in the depression of the thirties, and thereafter, in the forties, fifties and sixties events developed rapidly into new and far more challenging frames of reference. Both the fighting phrases of the Progressive Era and the radical remedies advocated during the New Deal have now taken

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<sup>4</sup> See W. SWINDLER, *COURT AND CONSTITUTION IN THE 20TH CENTURY*: I. THE OLD LEGALITY, 1889-1932 ch. 4 (1969); Westin, *The Supreme Court and the Populist Movement*, 15 J. POLITICS 3 (1953); R. HOFSTADTER, *THE PROGRESSIVE MOVEMENT* *passim* (1963); LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA* chs. 1-3 (1954).

on a quaintness which comes not only from battles long since ended but from a contrast with the issues of the present. Taken all together, however, the continuum of crisis from the age of Populism to the age of racial, urban and ecological disturbance looks to some theme of constitutional modernization which may be a guide for the decade of the seventies.<sup>5</sup>

#### THE FEDERAL CONSTITUTION PHASE

The eighty years since 1890 in national constitutional law may be readily divided into two broad eras—the first dating from 1882 when Senator Roscoe Conkling made his famous oral argument in *San Mateo County v. Southern Pacific Railway*,<sup>6</sup> and 1886 when, in a companion case,<sup>7</sup> the majority of the Court accepted as “settled doctrine” the Conkling contention that the word “person” in the Fourteenth Amendment had been intended to include “legal persons” (i.e., corporations) as well as living individuals. This prevailing judicial view, initiated in the *Slaughterhouse Cases*<sup>8</sup> of the previous decade and confirmed in the narrow constructions of state and national regulatory authority in the following decade,<sup>9</sup> established a firm base for a laissez-faire doctrine in American constitutional law which was not to be shaken until 1937.

The second era accordingly dates from the latter year, when the Supreme Court, in the challenge presented by the New Deal and brought to a crisis by the so-called “court-packing” proposal of President Franklin D. Roosevelt,<sup>10</sup> signalled its abandonment of half a century of narrow construction and its launching upon a totally new course in constitutional law. The abandonment was signalled by *West Coast Hotel Co. v. Parrish*,<sup>11</sup> the new course was pointed out by *NLRB v. Jones & Laughlin Steel Corp.*<sup>12</sup> The very abruptness of the point in time when the change occurred underlines the fact

<sup>5</sup> See AMERICAN ASSEMBLY, *THE FORTY-EIGHT: THEIR TASKS AS POLICY-MAKERS AND ADMINISTRATORS* *passim* (1955); Bebout, *Recent Constitution Writing*, 35 TEX. L. REV. 1071 (1957).

<sup>6</sup> 116 U.S. 138 (1885). The argument had been made three years before. The transcript of the oral argument is in the Library of the Supreme Court of the United States.

<sup>7</sup> *Santa Clara County v. Southern Pac. Ry.*, 118 U.S. 394 (1886).

<sup>8</sup> 83 U.S. (16 Wall.) 36 (1872).

<sup>9</sup> See W. SWINDLER, *supra* note 4, chs. 2-5.

<sup>10</sup> See BAKER, *BACK TO BACK: THE DUEL BETWEEN F. D. R. AND THE SUPREME COURT* (1968); SWINDLER, *COURT AND CONSTITUTION IN THE 20TH CENTURY: II. THE NEW LEGALITY, 1932-1968* ch. 3 (1970).

<sup>11</sup> 300 U.S. 379 (1937).

<sup>12</sup> 301 U.S. 1 (1937).

that from this instant forward the pace of constitutional change would continually accelerate.<sup>13</sup>

From 1937, the development of federal constitutional law has been marked by three dramatic stages, each a logical outgrowth of its predecessor.<sup>14</sup> The ideological watershed which was crossed in 1937 was simply a passing from the old judicial insistence upon a strictly and rigidly limited concept of governmental, and particularly legislative, power with reference to the surveillance of private economic activity and the improvement of private social conditions. On the other side of the watershed was the contrasting concept of broad legislative competence to deal with problems of unbridled economic opportunism and unsatisfied social needs. The old constitutionalism was typified in Justice Sutherland's categorical denial that "the power of the federal government inherently extends to purposes affecting the nation as a whole."<sup>15</sup> The voice of the new constitutional era was Justice Douglas's, affirming "the power on the part of Congress . . . to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate . . . our economy."<sup>16</sup>

Thus the first stage of modern constitutionalism was this period (1937-1941) in which the Hughes Court unequivocally, in a series of cases validating the second round of New Deal reform legislation, asserted a sweeping, broad legislative power. By the end of this series of decisions, the fundamental premise of constitutional *laissez-faire* was as moribund as its companion premise in economic *laissez-faire*.<sup>17</sup> The second stage of new constitutionalism was ready to appear in the pronouncements of the Court of Chief Justice Stone: the repudiation of a half century of precedents upon which the old constitutional structure of severely limited government power had been erected. Repudiation of these precedents demanded their replacement by new authority which would become precedent for the future; and in the debate over how this new authoritative doctrine should be delineated the record of the Stone Court became one of apparent confusion and instability.<sup>18</sup>

Eventually from this intellectual turmoil, and during the Chief Justiceship of Fred M. Vinson when the Court demonstrated a lack

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<sup>13</sup> See W. SWINDLER, *supra* note 10, chs. 4, 5.

<sup>14</sup> See Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205 (1970).

<sup>15</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936).

<sup>16</sup> *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 396 (1940).

<sup>17</sup> SWINDLER, *supra* note 10, chs. 5, 6.

<sup>18</sup> *Id.* ch. 7.

of inclination toward further constitutional innovation, a degree of equilibrium emerged. It came to be identified as a balance between the poles of constitutional theory identified as "activism" and "restraint."<sup>19</sup> Essentially, the doctrine of restraint enunciated by Justices Frankfurter and Jackson, and later by Harlan and Stewart, stressed that the principle of broad legislative discretion established as the hallmark of modern constitutionalism left the initiative for action with the legislature, not with the judiciary. The counterbalancing doctrine of activism advanced by Justices Douglas, Black, Brennan and Chief Justice Warren urged that, in the face of failure of legislative initiative, the power to enforce specific guarantees, "absolutes," in the Constitution had to be exerted by some other agency of government.<sup>20</sup>

The first outburst of self-executing absolutes, although it had been launched in the last year of the Vinson Chief Justiceship, was in *Brown v. Board of Education*,<sup>21</sup> and presaged the ascendancy of "activism" in the main years of the Warren Court, marking the third and climactic stage in the development of federal constitutionalism of the present. After almost a decade of strengthening the rule of racial equality begun with *Brown*, the other elements in the jurisprudence of "absolutes" quickly followed one another: the rule of electoral equality initiated in *Baker v. Carr*,<sup>22</sup> and the rule of individual equality in the criminal process epitomized in *Gideon v. Wainwright*.<sup>23</sup>

Thus, at the end of the Warren Chief Justiceship in 1969, the basic principles of the new constitutionalism set in motion in 1937 were virtually complete. Whether, as watchers of the Court of Chief Justice Burger are continually announcing, the doctrine of the seventies will be a new conservatism<sup>24</sup> or, as is more likely, a return to the pole of restraint from the heretofore dominant pole of activism, the fundamental fact is that it is the constitutionalism evolved in the period since 1937 which will be the source of decisional rules.

This condensed summary of American constitutional law of the twentieth century is pertinent to a consideration of state constitutional development to date for several reasons. Most important is

<sup>19</sup> See MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT ON THE COURT *passim* (1961).

<sup>20</sup> See Swindler, *supra* note 14, at 231 *et seq.*

<sup>21</sup> 347 U.S. 483 (1954), *reargued on question of relief*, 349 U.S. 294 (1955).

<sup>22</sup> 369 U.S. 186 (1961).

<sup>23</sup> 372 U.S. 335 (1963).

<sup>24</sup> See New York Times Service article, *Burger Tips Court to Conservatism*, released October 12, 1970.

the manifest fact that the trend of political economy as well as federal constitutional law has been centripetal—a massive shift toward what Professor Arthur S. Miller calls a “unitary federalism.”<sup>25</sup> It has become virtually axiomatic that problems and processes that extend from coast to coast require a coextensive administrative power of surveillance; this, in turn, either equates with federal rather than state power, or requires that the states affirmatively, and, so near as practicable, uniformly, act to effect this surveillance.

#### THE STATE CONSTITUTIONAL PHASE

In the last quarter of the nineteenth century, the center of political gravity was still in the states. In the Great Plains and the Rocky Mountains, indeed, the process of creating states out of territories was still going on, and at least one observer felt that the initial constitutions in these areas were “drawn up and adopted . . . with very little study by frontiersmen strongly under the influence of the tenets of Jacksonian democracy.”<sup>26</sup> However that might be, the record of the older states to the east showed the developments which were to come; many of these states were, by the eighties and nineties, operating under the second or third constitution adopted since statehood, and the basic changes usually were spaced at intervals of a generation,<sup>27</sup> thus suggesting that new charters emerged from a substantial alteration in the social or economic structure of the area. Certainly the new constitutions grew in size as their writers sought to come to grips with new issues. The first general wave of revision in the Ohio and Mississippi Valleys, for example, in the 1840's and 1850's sought to deal with the problem of underfinanced state banks and the issuance of unsecured banknotes.<sup>28</sup> The generation after the Civil War was concerned with the depredations of the rapidly spreading railroads and, by the eighties, with the problems of the interstate corporation and ultimately the trust.<sup>29</sup>

<sup>25</sup> Miller, *Toward a Concept of Constitutional Duty*, in 1968 S. CT. REV. 225.

<sup>26</sup> Anderson, *The Constitution of Minnesota*, 5 MINN. L. REV. 407, 433 (1921). See Dealey, *The Trend of Recent Constitutional Changes*, 8 PROCEEDINGS AM. POL. SCI. ASS'N 53 (1912); Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 8 (May 1892).

<sup>27</sup> See GREEN, *CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES* *passim* (1930); HICKS, *THE CONSTITUTIONS FOR THE NORTHWEST STATES* (1923); McMurray, *Tendencies in Constitution Making*, 2 CALIF. L. REV. 203 (1914).

<sup>28</sup> See Swindler, *Missouri Constitutions: History, Theory and Practice*, 23 MO. L. REV. 32, 35-37 (1958).

<sup>29</sup> *Id.* at 39-40. See also Adrian, *Trends in State Constitutions*, 5 HARV. J. LEGIS. 311, 314-15 (1968).



Two constitutional developments, in Illinois in 1870 and in Missouri in 1875, marked the beginning of modern state constitutionalism. The Illinois constitutional amendment brought grain elevators and warehouses under government supervision and thus substantially developed in American law the concept of the administrative regulatory agency.<sup>30</sup> Its constitutionality was upheld in 1877.<sup>31</sup> The Missouri innovation was the so-called "home rule" article in the state constitution of 1875, which for half a century thereafter would be cited as the touchstone of modern organization for local government.<sup>32</sup> There were other changes fermenting during this period generally; a writer in 1892 found that in four contemporary adoptions of new charters, two in states just admitted to the Union (Idaho and Wyoming) and two post-Reconstruction Southern states (Kentucky and Mississippi), there were a number of startling challenges to orthodox common law and public law. The secret ballot, woman suffrage, limitations upon hours of labor, and numerous reforms in tort law were among the novelties.<sup>33</sup>

These constitutional innovations, and the legislation drafted in implementation of them, precipitated a certain amount of litigation both in state and federal courts. The ultimate question, of course, was whether these state attempts to cope with new economic and social issues unanticipated by the earlier constitutions were derogatory of any fundamental theories held to be ingrained in English common law, natural law or some vaguely conceived "higher law."<sup>34</sup> The results of this constitutional testing in the courts were ambivalent; generally, the judicial course in the area of economic regulation was one of retreat from the position taken in *Munn v. Illinois*.<sup>35</sup> The rapid ascendancy of laissez-faire philosophy in federal constitutional law during this period would mean that what was forbidden to national government was likely also to be forbidden to state government, and periodically the Supreme Court would deliver an opinion to that effect.

The injunction against state impairment of contracts was the most common refuge of laissez-faire; thus, in 1878, a North Carolina constitutional amendment increasing the exemption of debtors' property from sale upon execution of a judgment was held invalid

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<sup>30</sup> ILL. CONST. art XIII.

<sup>31</sup> *Munn v. Illinois*, 94 U.S. 113 (1877).

<sup>32</sup> MO. CONST. art X, § 16 (1876). See Swindler, *supra* note 28.

<sup>33</sup> See Dealey, *supra* note 26, at 53 *et seq.*

<sup>34</sup> See Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928).

<sup>35</sup> See W. SWINDLER, *supra* note 4, chs. 2, 4.

as to prior obligations.<sup>36</sup> Many communities which had sought relief from their state governments for obligations undertaken in the heyday of railroad promotion, after the railroad developments failed to materialize, were held fully liable on their bonds to holders in due course.<sup>37</sup> On the other hand, state efforts to prohibit discriminatory rate practices among railroads were often frustrated by the Court's reliance on the Commerce Clause.<sup>38</sup>

Conservatives were even more aghast at the constitutional experiments of the Progressive Era. The provision for the initiative and referendum in the Arizona constitution caused a strong effort in Congress to block Arizona's admission to statehood, even though the Supreme Court had already declared that once admitted to the Union a state could enact virtually any domestic legislation it desired.<sup>39</sup> Taft's Attorney General, George W. Wickersham, inveighed against the Arizona provisions: "The uncertain sands of shifting popular inclination . . . are far remote from the conceptions of the frames of . . . the Constitution of the United States."<sup>40</sup> A New York eight-hour day for bakers was set aside,<sup>41</sup> although an Oregon law fixing maximum hours for women was upheld,<sup>42</sup> thanks, in large measure, to the classic "Brandeis brief" which was submitted in support of the state's power.

The attempts of the states to develop modern constitutional power to deal with modern economic and social issues were thus all too often to be thwarted by a conservative Court obsessed with restraining government from interfering with the free enterprise system. The result, for state constitutional development during the second and third quarters of the twentieth century, has been a critical increase in the movement of political power toward the national government and away from the states. It is difficult to deny the contention that the adamance of the narrow constructionists on the Court, in the first three decades of the century, created a vacuum in state constitutionalism which, in the depression of the thirties,

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<sup>36</sup> *Edwards v. Kearzey*, 96 U.S. 595 (1878).

<sup>37</sup> *Rees v. Watertown*, 86 U.S. (19 Wall.) 107 (1873); *Ralls County v. United States*, 105 U.S. 733 (1881); *Louisiana ex rel. Nelson v. St. Martin's Parish*, 111 U.S. 716 (1884); *Mobile v. Watson*, 116 U.S. 289 (1886).

<sup>38</sup> *Wabash, St. L. & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886).

<sup>39</sup> *Coyle v. Smith*, 221 U.S. 559 (1911).

<sup>40</sup> Wickersham, *New States and Constitutions*, 21 YALE L.J. 1, 24 (1911).

<sup>41</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>42</sup> *Muller v. Oregon*, 208 U.S. 412 (1908). *Accord*, *Bunting v. Oregon*, 243 U.S. 426 (1917).

invited federal occupancy. In 1915 a state effort to outlaw "yellow dog" labor contracts was nullified;<sup>43</sup> two years later it was a Washington state law regulating private employment agencies;<sup>44</sup> then it was, in 1920, an Arizona anti-picketing provision;<sup>45</sup> in 1923, a Kansas attempt to create a labor relations court<sup>46</sup> and a Nebraska effort to regulate weights of foodstuffs.<sup>47</sup> In 1926 the Court denied Pennsylvania a power, under the public health laws, to regulate materials going into bedding,<sup>48</sup> and denied to New York a police power to regulate the resale of theater tickets.<sup>49</sup> Finally, amid the crashing structure of the depression, the Court in 1932 invalidated an Oklahoma effort to limit the issuing of licenses for certain businesses as a means of stabilizing the market for such businesses in the public interest.<sup>50</sup>

This consistent opposition of the Court conservatives to all efforts, state or federal, to bring some degree of order into the erratic performance of the industrial system which was steadily supplanting the dominant rural economy of the past century was at least part of the story in the sapping of state constitutional vitality in this period. Another, of course, was the negligence of the state citizenry in keeping viable some of the fundamental standards of their own charters, the decades of inaction on constitutionally required reapportionment of electoral districts being the most obvious and flagrant example.<sup>51</sup> The failure of the electorate to modernize constitutions, even when given the opportunity, contributed also to the decline of local power in favor of national.<sup>52</sup>

A writer in 1934 discerned that the depression had made critical "the efforts to reconcile the extraordinary features of much of the emergency legislation . . . with the express and implied restrictions of the state constitutions." He pointed to the fact that although the Supreme Court, in upholding the Minnesota mortgage moratorium act,<sup>53</sup> had offered a cue to the states in its comment that emergency

<sup>43</sup> *Coppage v. Kansas*, 236 U.S. 1 (1915).

<sup>44</sup> *Adams v. Tanner*, 244 U.S. 590 (1917).

<sup>45</sup> *Truax v. Corrigan*, 257 U.S. 312 (1921).

<sup>46</sup> *Wolff Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923).

<sup>47</sup> *Burns Baking Co. v. Bryan*, 264 U.S. 504 (1923).

<sup>48</sup> *Weaver v. Palmer Bros.*, 270 U.S. 402 (1926).

<sup>49</sup> *Tyson & Brother v. Banton*, 273 U.S. 418 (1927).

<sup>50</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>51</sup> See *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>52</sup> See *Dodd, Illinois Rejects a New Constitution*, 7 MINN. L. REV. 177 (1923).

<sup>53</sup> *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1932).

might justify the postponement, although not the abridgement, of contract rights, only a few state courts had taken the cue in construing the constitutionality of similar moratorium statutes. This, said the writer, pointed to "a conflict between what is ordinarily termed mechanical jurisprudence, to the effect that constitutional phrases and the fundamental principles which they are presumed to sanction must not be frittered away by legislative action or judicial interpretation," and the opposite view that "constitutional phrases, as other terms in the law, should conform to the exigencies of time and place."<sup>54</sup> Simply stated, narrow construction was even more thoroughly ingrained in the state courts than in the Supreme Court of the United States. This was further illustrated in the lethargic response to the decision in *Nebbia v. New York*,<sup>55</sup> which in federal law broadened the concept of activity affected with a public interest into an almost universal applicability.<sup>56</sup>

Both the state and federal courts of last resort were concerned, in the early New Deal years, with the traditional division between state and national powers as well as between broad and limited power in government in general.<sup>57</sup> The hostility of the Hughes Court, from 1935 to 1937, toward Congressional efforts at bold and innovative legislation more than counteracted its tendency in the early years of the depression to find relatively greater freedom for such legislation in the states.<sup>58</sup> As a consequence, state courts' inclination to continue in a narrow constructionist path vis-à-vis their own constitutions left the states in the lurch when, after *Jones & Laughlin*, the general power of legislation was rapidly and sweepingly liberalized. Thus, even though some state courts sustained complementary local legislation against charges of unconstitutional-

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<sup>54</sup> Haines, *State Constitutional Law in 1933-34*, 28 AM. POL. SCI. REV. 611, 615 (1934). Unfortunately, this excellent twenty year series of annual surveys was discontinued in 1949. The present writer has hopes of seeing it revived in the near future. For the purposes of the current paper, citations to many of the annual surveys in notes 56, 57, 60, and 63-66, *infra*, may be treated as citations by reference to the specific state cases summarized therein; hopefully, time and space will be available on some future occasion to correlate the doctrine in the state constitutional cases expressed in these surveys, as well as in the two following decades, to document more completely the general conclusions set out in this portion of the present paper.

<sup>55</sup> 291 U.S. 502 (1934).

<sup>56</sup> Haines, *supra* note 54, at 624-25. See also Haines, *State Constitutional Law in 1934-35*, 29 AM. POL. SCI. REV. 610, 615, 617 (1935).

<sup>57</sup> See Grant, *State Constitutional Law in 1935-36*, 30 AM. POL. SCI. REV. 692 (1936).

<sup>58</sup> SWINDLER, *supra* note 10, at ch. 2.

ity,<sup>59</sup> there was a general ambivalence in the matter in state constitutional law. State courts, not undergoing the dramatic change in personnel and personalities which took place in the Supreme Court of the United States between 1937 and 1941, generally continued in the old order.<sup>60</sup> The protest of the Pennsylvania Superior Court that the state fair sales act "offends against the due process clause . . . and the Bill of Rights," was rather typical of the prevailing view.<sup>61</sup>

The vast expanse of federal authority and influence under statutes like the Social Security Act,<sup>62</sup> with its provision for state enactments conformable with the federal law, changed the issues in state constitutional decisions in the early forties.<sup>63</sup> As for the emergency controls introduced by Congress during World War II, some contemporary observers believed that they tended to strengthen conservative and narrow constructionist positions in the state courts.<sup>64</sup> Wartime economic legislation "exercised administratively in fields long reserved to the states" tended to be strictly limited whenever litigation presented the issue in local terms.<sup>65</sup> In the immediate postwar era, the restlessness of organized labor in particular led to a revival of the old laissez-faire theory of freedom of contract in the state "right to work" movement which was touched off by the Taft-Hartley Act's disclaimer of federal preemption in the field of labor relations.<sup>66</sup>

Thus the constitutions of the various states, by the midway point in the twentieth century, together with the decisional law deriving from the documents, indeed appeared to be at a crisis, although the nature of the crisis has not been too clearly analyzed up to now. The metamorphosis in federal constitutional law between 1937 and

<sup>59</sup> See *Agricultural Prorate Comm'n v. Superior Court*, 5 Cal. 2d 550, 55 P.2d 495 (1936); *Rohrer v. Milk Control Bd.*, 322 Pa. 257, 186 A. 336 (1936); *Reynolds v. Milk Comm'n*, 163 Va. 957, 179 S.E. 507 (1935).

<sup>60</sup> See Grant, *State Constitutional Law in 1938-39*, 33 AM. POL. SCI. REV. 615 (1939). But see Aiken, *State Constitutional Law in 1939-40*, 34 AM. POL. SCI. REV. 700 (1940).

<sup>61</sup> *Commonwealth v. Zasloff*, 137 Pa. Super. 96, 8 A.2d 801 (1939). *Accord*, *Lief v. Packard-Bamberger & Co.*, 123 N.J.L. 180, 8 A.2d 291 (Sup. Ct. 1939).

<sup>62</sup> 42 U.S.C. §§ 301 *et seq.* (1936).

<sup>63</sup> See tenBroek, *State Constitutional Law in 1942-43*, 37 AM. POL. SCI. REV. 642-44 (1943).

<sup>64</sup> tenBroek & Graham, *State Constitutional Law in 1943-44*, 38 AM. POL. SCI. REV. 670 (1944).

<sup>65</sup> tenBroek & Graham, *State Constitutional Law in 1944-45*, 39 AM. POL. SCI. REV. 685 (1945).

<sup>66</sup> 29 U.S.C. §§ 151-66 (1947). See tenBroek and Graham, *State Constitutional Law in 1945-46*, 40 AM. POL. SCI. REV. 703, 704 (1946).

the end of the Warren Court in 1969 contrasts sharply with prevailing doctrine in state constitutional law. While various new state charters had been adopted in the first half of the century, it is fair to say that hardly any fresh concepts in state government, with the possible exception of the experiment in unicameralism introduced in Nebraska in 1937,<sup>67</sup> were developed in any of them. As for the piecemeal amendment process, it not only has failed to keep the existing constitutions up to date, but often "added further complications to existing inadequacies."<sup>68</sup>

### TOWARD A THEORY OF 20TH CENTURY STATE CONSTITUTIONS

What, then, are some of the unsolved problems involved in striving for a viable state constitutionalism oriented toward the issues of the oncoming generation? One might begin seeking the answers not in the constitutions and comprehensive amendments which have been proposed and adopted, but in those which have been rejected in the past five years. While peculiar local circumstances can be cited in explaining the defeat for each of them, it is disturbing to note the rather conspicuous fact that in several instances the fatal flaw in the view of the electorate was the very type of innovative conceptualization of constitutional duty which is the key to revitalization of state government.<sup>69</sup>

Thereafter, and alternatively, one may consider what specifically has been accomplished in the cases of successful revision of state charters, whether by whole new constitutions or by comprehensive amendment. Have the fundamental premises of the new documentary language opened up avenues for fresh new judicial interpretations? That, of course, can only be ascertained when the courts have handed down opinions on any new constitutional constructions which may spring from these documents. But if one compares what is said in the new constitutions with what was said on the same subject in the supplanted constitutional article, and what the state courts have said about the subject, one may have a practical measure for the degree of his optimism or pessimism.<sup>70</sup>

<sup>67</sup> NEB. CONST. art XV.

<sup>68</sup> STURM, *supra* note 2, at 1.

<sup>69</sup> See, e.g., Hawaii's experience, where twenty-two revisions in the form of amendments to its 1963 constitution were adopted in 1968. STURM, *supra* note 2, at 56.

<sup>70</sup> See WHEELER & KINSEY, *MAGNIFICENT FAILURE: THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967-68* (1970); Nunez, *New York State Constitutional Reform: Past Political Battles in Constitutional Language*, 10 WM. & MARY L. REV. 366 (1968); CORNWELL & GOODMAN, *THE POLITICS OF THE RHODE ISLAND CONSTITUTIONAL CONVENTION* (1969).

Finally, one may fashion a new model for state constitutions to be—not as deliberately provocative, perhaps, as Tugwell's draft of a new constitution for the "United Republics of America,"<sup>71</sup> but one which at least will emphasize what appear to be unanswered needs in the new charters so far drafted. Such a model need not indulge in flights of fancy; state constitutions, even when streamlined and liberalized, are essentially and necessarily earthy things. They always will deal with government close at hand, and thus need not seek to echo the more general definitions of government in the national Constitution.

This first requisite, as the editors of the current draft of the *Model State Constitution* point out, is that such a model should divest itself of "the hedges against sin or the admonitions for virtue": the all too characteristic "prolix provisions designed to confine or narrowly direct the exercise of public authority."<sup>72</sup>

The old truism that state constitutions are limitations on power otherwise vesting in state government needs to be revived as a standard of both drafting and construction. That is, the needless formulae and details which have so long inhibited state action and thus forced reliance on the national government ought to be excised from the document. Not the least important accomplishment of the revised Virginia Constitution, in fact, was the deleting of almost fifty percent of the text of the existing charter.<sup>73</sup> But so long has inhibiting language been embedded in most state constitutions, and so long has its interpretation and the narrow interpretation of state powers by the federal Supreme Court worked to the weakening of state constitutional power, that mere excision is not enough; in all practical likelihood, something like a canon of broad construction may have to be drafted in order to encourage courts to apply Brandeis's call to greatness;<sup>74</sup> if we would guide by the light of reason, we must let our minds be bold.

#### THWARTING THE FUTURE: SEVEN REJECTED CHARTERS

In slightly more than four years, seven states' new constitutions have been rejected by their electorates: New York in 1967, Maryland and Rhode Island in 1968, New Mexico in 1969 and Arkansas,

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<sup>71</sup> R. TUGWELL, *MODEL FOR A NEW CONSTITUTION* (1970).

<sup>72</sup> NATIONAL MUNICIPAL LEAGUE, *MODEL STATE CONSTITUTION* ix (6th ed. rev. 1968).

<sup>73</sup> See REPORT OF VIRGINIA COMMISSION ON CONSTITUTIONAL REVISION 333 *et seq.* (1969).

<sup>74</sup> Cf. *Whitney v. California*, 274 U.S. 357, 372 (1927).

Idaho and Oregon in 1970.<sup>75</sup> In California, where exhaustive agenda for constitutional revision had been programmed to be submitted to the voters for biennial referenda, Phase II of the three phase plan was rejected in 1968.<sup>76</sup> This rather emphatically says something about modernization of state constitutions—in the negative. When substantially more rejections than ratifications take place during a period when everyone is insisting that modernization is the crying need, some sober accounting is called for.

Much has been made of the fact that, in the spectacular failures in Maryland and New York in particular, the referendum on the new constitution was on an "all or none" basis. That was not true of the California three phase revision, but in any case, the method of submitting the proposal would appear to be of secondary importance; what is of primary importance is the fact that there is a substantial and consistent opposition to change. The particular reasons for the opposition may vary from state to state, but the net effect is the same, and that is to retard the expeditious development of flexible and efficient modern processes of government.

Offering to the electorate in a single package an integrated revision of the existing constitution has substantial logic but an even more substantial political handicap. It permits disparate groups critical of different and unrelated elements in the draft proposal to unite into an aggregation of minorities which thus becomes an accidental majority in opposition. It hazards its chances for adoption on the unwarranted assumption that the average elector has the same sophisticated understanding of the flaws in the existing charter and the rationale of the new remedies which became apparent to the draftsmen in the course of their work on the revision. And the result of rejection is doubly disastrous, either because there is no provision in local procedure for resubmitting the proposals in separable form or because the onus of the first defeat continues to attach to the separate articles eventually resubmitted.<sup>77</sup>

Thus in seven states in the period since November 1967, modernization of state constitutional machinery has been delayed for varying amounts of time. Of course, one must ask whether the draft constitutions actually embodied that much improvement—New

<sup>75</sup> See STURM, *supra* note 2 at 56 *et seq.*; Sturm, *Patterns of Recent State Constitution-Making: Procedure, Substance and Comment* (Paper delivered August 25, 1970, before the National Municipal League Conference on Government, Portland, Oregon); N.Y. Times, Nov. 5, 1970, at 38, col. 1.

<sup>76</sup> STURM, *supra* note 2, at 56.

<sup>77</sup> See WOLF, *CONSTITUTIONAL REVISION IN PENNSYLVANIA: THE DUAL TACTIC OF AMENDMENT AND LIMITED CONVENTION* 22 *et seq.* (1969).



York's lamented rejected document had signally failed to reform its unconscionably complex judicial article, while Virginia's just-adopted new charter elected to preserve the twenty-one year age qualification for voting without taking into account the opportunity for legislative response to the Congressional enactment of a lower voting age for national elections.<sup>78</sup> Too much nonconstitutional, statutory matter has been retained both in the rejected charters and in those adopted, due, most likely, to the lack of political finesse often displayed by the leading reformers as against the ingrained habits and vested interests of the political practitioners.<sup>79</sup>

The fact remains, however, that a number of specific losses have been incurred in these constitutional rejections: New York, in voting down a new charter because of the inseparable and controversial provisions on state aid to private and parochial schools and assumption of local welfare financing, gave up the chance to broaden the powers of the executive to reorganize state departments and agencies.<sup>80</sup> Yet one of the greatest needs of the present is to change the executive branch from "a feeble institution" to one able to deal efficiently and economically with the administration of increasing amounts of money appropriated by legislatures for "the political, social and cultural responsibilities demanded of . . . a modern government."<sup>81</sup> In Maryland, the new charter had sought to come to grips with another chronic issue of regional administration of over-lapping urban-rural services in population areas in transition from what was predominantly one to what may become predominantly the other.<sup>82</sup> On the touchy subject of wiretapping in the area of crime prevention and federally-guaranteed constitutional rights, the Rhode Island constitution-makers marched up the hill and down again, but even the limited concession to the case for banning wiretapping was lost when the whole constitution was lost.<sup>83</sup>

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<sup>78</sup> See Nunez, *supra* note 70, at 376; VIRGINIA COMMISSION REPORT, *supra* note 73, at 104 *et seq.* Compare the New York Constitution actually submitted to the electorate in 1967 with a more objective, "ideal" draft, in WEINSTEIN, A NEW YORK CONSTITUTION MEETING TODAY'S NEEDS AND TOMORROW'S CHALLENGES (1967).

<sup>79</sup> See CORNWELL & GOODWIN, *supra* note 70, ch. 7. See also Sandelius, *The Kansas Experience: State Constitutional Revision and the Moral Element*, 40 NEB. L. REV. 575 (1961).

<sup>80</sup> Nunez, *supra* note 70, at 376.

<sup>81</sup> RICH, STATE CONSTITUTIONS: THE GOVERNOR 31 (1960). See Flynn, *Constitutional Difficulties of Utah's Executive Branch and the Need for Reform*, 1966 UTAH L. REV. 351.

<sup>82</sup> See WHEELER & KINSEY, *supra* note 70, ch. 7.

<sup>83</sup> CORNWELL & GOODWIN, *supra* note 70, ch. 7.

Strengthening the executive branch, and liberalizing the provisions on pledging the state's credit in bond financing, were two proposals in the rejected Idaho constitutional revision.<sup>84</sup> The 1970 voting on amendments as well as whole new constitutions was a spotty record, with some states moving into new areas of conservation and the combatting of pollution while others disapproved either the ideas or the forms in which they were drafted.<sup>85</sup> None of this is to disparage the very substantial advances which have been made in the 1970 and immediately preceding elections in various parts of the country, but only to note that progress is a slow and costly business, in other sections where the investment of time and talent as well as money has produced no measurable advance except in emphasizing that the need for modernization is not disposed of merely by thwarting it.<sup>86</sup>

#### JUDICIAL DOCTRINE AND THE FUTURE

Because state constitutions are all too detailed and explicit, there is a built-in orientation toward strict construction in the majority of states. Despite the assurance that the legislative power is plenary in the absence of specific constitutional limitations, and that the police power of the sovereign resides in the lawmaking branch, courts tend to offset the legislative effort in many cases by a narrow reading of the statutory language and the constitutional formulae which may apply.<sup>87</sup> Moreover, new constitutions or constitutional amendments are ambivalently treated. Although the standard protestation is that "a constitutional provision can speak only to the future," the influence of past construction is readily preserved when a new provision preserves *in haec verba* the language of the provision it supplants.<sup>88</sup> As one state court has observed: "When a portion of the constitution has been construed, considered and acted

<sup>84</sup> Gwins & Martin, *Idaho Constitutional Revision: Two Views*, 7 IDAHO L. REV. 87 (1970).

<sup>85</sup> New York Times, Nov. 5, 1970, at 38, col. 1. Barnhart, *A New Constitution for Arkansas?*, 17 ARK. L. REV. 1 (1962-1963).

<sup>86</sup> See Flynn, *supra* note 81, at 369. This is part of a useful symposium on state constitutional law. For a similar symposium, see Symposium on Constitutional Revision, 72 W. VA. L. REV. 33 (1969-1970).

<sup>87</sup> See, e.g., Spearman v. Williams, 415 P.2d 597 (Okla. 1966); DeAryan v. Butler, 119 Cal. App. 2d 674, 260 P.2d 98 (1953), cert. denied, 347 U.S. 1012 (1953); Chesapeake & O. Ry. v. Greenup County, 175 F.2d 169 (6th Cir. 1949); Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (1954). See also Swindler, *State Constitutional Law: Some Representative Decisions*, 9 WM. & MARY L. REV. 166 (1967).

<sup>88</sup> Pommerehn v. Sauley, 233 Ind. 140, 117 N.E.2d 556 (1954); Goff v. Hunt, 6 N.J. 600, 80 A.2d 104 (1954); Snow v. Keddington, 113 Utah 325, 195 P.2d 234 (1948).

on for decades in one way by all branches of government," only an explicit amendment altering the language or the literal effect of the provision will warrant a change in construction. "[The constitution] should not be changed, expanded or extended beyond its settled intent and meaning by any court to meet daily changes in mores, manners, habits or thinking of the people," except by amendment, the same opinion declared.<sup>89</sup>

State courts have been caught between the millstones of past restrictive construction encouraged by the overelaborate details of their own constitutions and the sudden liberalization of construction of legislative power (state as well as national) in the Supreme Court of the United States, already described. The dilemma resulting from these opposing forces, as illustrated in the interpretation of state fair trade acts, has been the subject of a number of commentaries.<sup>90</sup> It could also be applied to the subjects of municipal corporations' discretionary authority in bond issuance,<sup>91</sup> the long line of bar admission and bar integration cases,<sup>92</sup> the accommodation of local economic needs by liberalizing the statutory provisions relating to taxes on newly located industry,<sup>93</sup> and the general reform of civil or criminal procedure.<sup>94</sup>

Under the prodding example of federal constitutional doctrine, the courts in the states having tended to develop a somewhat broader application of the concept of delegability of legislative power,<sup>95</sup> and to define more broadly the police power in general,<sup>96</sup>

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<sup>89</sup> *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1966).

<sup>90</sup> Note, *Counterrevolution in Constitutional Law*, 15 STAN. L. REV. 309 (1963), and authorities cited therein.

<sup>91</sup> Note, *Judicial Activism and Municipal Bonds: Killing Two-Thirds With One Stone?*, 56 VA. L. REV. 295 (1970); Note, *Alabama Constitutional Restrictions on Local Government Indebtedness*, 21 ALA. L. REV. 427 (1969). See also Beckman & Ingraham, *The States and Urban Areas*, 30 LAW & CONTEMP. PROB. 76 (1965); Note, *State v. City: A Study in Preemption*, 36 S. CAL. L. REV. 430 (1963); Etter, *County Home Rule in Oregon*, 46 ORE. L. REV. 251 (1967).

<sup>92</sup> Note, *Constitutional Law—Unified Bar in Georgia*, 21 MERCER L. REV. 355 (1970).

<sup>93</sup> *Edge v. Brice*, 253 Iowa 710, 113 N.W.2d 755 (1962); 17 RUTGERS L. REV. 233 (1962).

<sup>94</sup> *Cohn v. Borchard Affiliations*, 25 N.Y.2d 237, 303 N.Y.S.2d 633, 250 N.E.2d 690 (1969); 34 ALBANY L. REV. 189 (1969).

<sup>95</sup> *Commonwealth v. Associated Ind.*, 370 S.W.2d 584 (Ky. 1963).

<sup>96</sup> *New York State Thruway Auth. v. Ashley Motor Court, Inc.*, 10 N.Y.2d 151, 218 N.Y.S.2d 640, 176 N.E.2d 566 (1961); *Warren v. Marion County*, 222 Ore. 307, 353 P.2d 257 (1960); *Milk Control Comm'n v. Batista*, 413 Pa. 652, 198 A.2d 840 (1964); *Porter v. Oberlin*, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965).

although, with reference to the exercise of the power, the nexus between public need and the action taken may be narrowly defined.<sup>97</sup> With reference to the recurrent question of use of public school buses by private school pupils, the courts are still inclined to be all but inflexible.<sup>98</sup>

An encouraging trend appears to have developed in quite recent years, as state legislatures have been urged to act more boldly under existing constitutional power, and courts in a number of states have sustained their actions. Where the constitutional language is not in itself restrictive, the general policy endorsed by the constitutional language need not be subjected to rules of strict construction.<sup>99</sup> And where historically a word or phrase has taken on a new meaning or understanding now in general acceptance, which differs from the meaning of the time of enactment of the constitutional passage in which the word or phrase appears, the recent usage will apply.<sup>100</sup> The self-executing nature of many constitutional provisions has been reaffirmed,<sup>101</sup> and in matters of constitutional questions the issue of standing has been disposed of in a manner more conformable with recent federal decisions.<sup>102</sup> The matter of the wisdom of legislation is once again being left to the legislature, and any changing view of public policy relating to legislative enactments is apt to be accepted by the courts.<sup>103</sup> Police power, if reasonably invoked, is upheld,<sup>104</sup> and where this involves anti-discrimination standards it is unequivocally validated.<sup>105</sup>

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<sup>97</sup> *Ghaster Properties v. Preston*, 200 Ohio Op. 2d 51, 184 N.E.2d 552 (C.P. 1962); *Group Health Ins. v. Howell*, 43 N.J. 104, 202 A.2d 689 (1964).

<sup>98</sup> *See Board of Educ. v. Antone*, 384 P.2d 911 (Okla. 1963).

<sup>99</sup> *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966).

<sup>100</sup> *In re Receivership of Wisser & Gabler*, 5 Ohio St. 2d 89, 214 N.E.2d 92 (1966).

<sup>101</sup> *In re Telephone Communications*, 55 Misc. 2d 163, 284 N.Y.S.2d 431 (Sup. Ct. 1967).

<sup>102</sup> *See Flast v. Cohen*, 392 U.S. 83 (1968); *Smith v. Board of Educ.*, 365 F.2d 770 (8th Cir. 1966); *Wiedenhof v. Michigan City*, 250 Ind. 327, 236 N.E.2d 40 (1968). For an illustration of the older federal and state view, *see Metropolitan Util. Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966).

<sup>103</sup> *State v. Hanusiak*, 4 Conn. Cir. 34, 225 A.2d 208 (1966); *Bron v. Weintraub*, 42 N.J. 87, 199 A.2d 625 (1964).

<sup>104</sup> *Spokane v. Valu-Mart, Inc.*, 69 Wash. 2d 712, 419 P.2d 993 (1966); *State v. Hughes*, 3 Conn. Cir. 181, 209 A.2d 872 (1965).

<sup>105</sup> *People v. Utica Daw's Drug Co.*, 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (4th Dep't 1962).

If this trend of recent state constitutional decision continues, it may conceivably counteract the inhibiting effect of the older narrow construction in so many areas of state jurisprudence. It is too early to determine whether, in the late sixties, state courts have begun to make a massive intellectual reversal of poles analogous to the reversal in federal constitutional law after 1937. There is still the unconscionable tangle of restrictive detail in the constitutions themselves, awaiting deletion through comprehensive amendments. But to the degree that a new state constitutionalism can be effected through a shift from narrow to broad judicial definition of legislative authority, there may be some ground for hope. The decade of the seventies holds the answer.

#### MODEL CONSTITUTIONS REVISITED

In their detailed study of "constitutional rigidity" in the matter of electoral majorities required for amending and modernizing state constitutions, Professor Kenneth Sears and Charles V. Laughlin a quarter of a century ago pointed out that needed changes in state charters were often thwarted by a mechanical demand of the amendment article, that a majority of all persons voting in the election in question would also have to vote for the constitutional proposal.<sup>106</sup> Since even this restriction cannot be deleted except by an electoral majority so defined, and since political experience shows that there is a consistently smaller proportion of the total vote in a general election cast for constitutional proposals than for live candidates for office, it would appear that in states having such a limitation the chances of securing an adequate majority for constitutional change would be minimal. Of the states in the Sears-Laughlin study which fell into this category—Illinois, Minnesota, Mississippi, Oklahoma, Tennessee and Wyoming—none has a constitution newer than 1907, and Illinois as of 1968 had adopted only fourteen amendments in nearly a century.<sup>107</sup> For states in this condition, certainly, constitutional rigidity is a prime factor in holding back modernization.

Another factor, described nearly forty years ago by Professor Walter F. Dodd, has to do with judicially non-enforceable provisions of state constitutions.<sup>108</sup> Such provisions may either be general policy statements, those against sin and in favor of civic virtue, or in

<sup>106</sup> Laughlin, *A Study in Constitutional Rigidity*, I, 10 U. CHI. L. REV. 141 (1943); Sears, *A Study in Constitutional Rigidity*, II, 11 U. CHI. L. REV. 374 (1944).

<sup>107</sup> STURM, *supra* note 2, at 7-10.

<sup>108</sup> Dodd, *Judicially Non-Enforceable Provisions of Constitutions*, 80 U. PA. L. REV. 54 (1931).

affirmation of powers the government already possesses, or they may be hortatory rather than mandatory, or, as Dodd suggests, they may be mandatory in language but practically impossible to implement judicially. The obvious example is a constitutional formula for enacting legislation; state courts tend to shy away from confrontation with lawmaking bodies, on the question of whether the latter have literally conformed with the constitutional requirement, as often as possible.<sup>109</sup>

A third problem, the reluctance of the people of a state to undertake the effort of modernizing their charters, was analyzed by Dr. W. Brooke Graves ten years ago. He identified three barriers to change: "psychological barriers," or the irrational devotion to the "wisdom of the fathers" which drafted a working document for their own time; legal and political barriers, illustrated in part by the Sears and Laughlin study already described; and pressure group barriers.<sup>110</sup> The latter have been further analyzed by Professors Cornwell and Goodman as "aspirants" to political advancement, "reformers" seeking to change the established order, "standpatters" seeking to resist the changes, "stand-ins" participating in the revision "to satisfy private ego needs for recognition," "statesmen" or political leaders seeking to dignify their image as constitution makers, and "chieftains" or bureaucrats seeking career advancement.<sup>111</sup> The combination of these barriers to modernization and disparate motivations for seeking modernization is a not insignificant dimension in constitution-making which is too often overlooked.

There is, finally, a problem represented in the opposite extreme, of constitutions too easily open to amendment. A study of the California Constitution in 1949 underlined this "amendomania" as flowing from (1) a too-easy procedure for enacting amendments, (2) a recurrent distrust of legislative motivation in developing certain statutory programs, (3) a counterbalancing dislike for restrictive (or sometimes overly broad) judicial interpretation of the constitution or statutes, and (4) a sporadic urge to "return to fundamentals."<sup>112</sup> The result, this study concluded, was that easy con-

<sup>109</sup> "A constitutional provision not judicially enforceable in one state may be so enforceable in another," Dodd wrote, citing provisions for the form of drafting statutes, *id.*, at 93.

<sup>110</sup> Graves, *Current Trends in State Constitutional Revision*, 40 NEB. L. REV. 560, 561-64 (1961). This is part of a symposium devoted to constitutional revision.

<sup>111</sup> CORNWELL & GOODMAN, *supra* note 70, at 83.

<sup>112</sup> Note, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279, 281-86 (1949).

stitutional amendment was taking the place of direct legislation in the form of the popular initiative.<sup>113</sup>

From these, and many other commentaries which could be cited, it is possible in conclusion of the present paper to suggest a few very elemental propositions *in re* a constitutionalism adapted to the anticipated but undefined requirements of the oncoming decades.

First, and probably so obvious that it will remain an unattainable objective, is the proposition that the constitution be brief and simple, confined to a basic definition of the functions of government with minimal limitations attached thereto. Bills of rights, although often falling into Dodd's category of unenforceable policy statements, should also be retained as a statement of the fundamental theory that in American government the individual's rights against the state are universally recognized.<sup>114</sup>

Second, and correlative with the first proposition, a modern constitution would define these functions of government in terms general enough to permit ready adaptation to changing circumstances. The twentieth century demands an adequate authority vested in the executive to enable him to take quick advantage of opportunities for advancing the state interest in whatever situations may arise, and periodically to regroup the activities within the administrative agencies, which by a political law of nature tend to generate spontaneously and to proliferate swiftly.<sup>115</sup> Of other branches of government, a modernized judiciary is of equal urgency; the ideal is a unified court system administered by trained management personnel equipped with such modern mechanical processes as are genuinely time-saving, and with a valid procedure for recruiting, appointing, training, compensating and removing or retiring both judicial and nonjudicial personnel.<sup>116</sup>

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<sup>113</sup> *Id.* at 287.

<sup>114</sup> See generally the studies of the bill of rights, administrative structure and related subjects in the ten-part State Constitutional Studies Project (1960-1961) of the National Municipal League. This is an essential starting point for any study of state constitutions.

<sup>115</sup> See, e.g., Note, *Constitutional Restrictions on the Use of Public Authorities in the New England States*, 43 B.U.L. REV. 122 (1963); Graves, *Some New Approaches to State Administrative Reorganization*, 9 W. POL. Q. 743 (1956); BALL & DARRAH, *STATE EXECUTIVE REORGANIZATION* (1961); and special studies by various recent state constitutional conventions or commissions.

<sup>116</sup> See Garwood, *Judicial Selection and Tenure—The Model Article Provisions*, 47 J. AM. JUD. SOC'Y 21 (1963); Bank, *The Crisis in the Courts*, FORTUNE, December 1961, at 86, 188. The literature on this subject is voluminous; see F. KLEIN, *JUDICIAL ADMINISTRATION AND THE LEGAL PROFESSION: A BIBLIOGRAPHY* (1963).

Finally, for most states where the transition from rural to urban economic order has resulted in a more or less static combination of the two, the standard constitutional article on local government needs to be rewritten in terms of regional administration of the transitional areas. This may well become the most practical and generally acceptable means of dealing with the problems of school consolidation, equitable administration of property taxes, and overlapping services of city, town and county governments.<sup>117</sup>

Given an ideal (and therefore, perhaps, only hypothetical) state constitution of this type, what of the issues of equal opportunity for racial and other social groups, for affirmative programs for conservation and reclamation of our environmental assets, for more efficient transportation, urban renewal, and the like? The answer (given the ideal simple charter) is that the capacity to act upon these matters has always been inherent in state and local government. It has only been paralyzed and smothered by the overgrowth of nonconstitutional matter in existing constitutions, the dead hand of past generations fearful of bureaucratic power or the cost of advancing upon new public issues, or both. Perhaps the ideal of a streamlined government will not be realized soon, if ever, but most of it could be attained by striking from fifty to eighty percent of the language from existing documents.

Thomas Jefferson was fond of saying that the earth belongs to the living. He simply meant that each generation needs to find its own best answer to its own needs. A constitution which is limited to basic principles of government is least likely to require successive new constitutions, as witness the Constitution of the United States. For the constitutions of the several states, this has not been the case, and each generation (whether it responds or not) is thus confronted with the demand for a document adequate for its own time.

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<sup>117</sup> See statistics and studies cited in VIRGINIA COMMISSION REPORT, *supra* note 73, at 213 *et seq.*